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WT Docket No. 96-59

GN Docket No. 90-314

1/ In the Matter of Amendment of Part 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap and Amendment of the Commission's Cellular PCS Cross-Ownership Rules, Notice of Proposed Rule Making, WT Docket No. 96-59, GN Docket 90-314, (rel. Mar. 20, 1996) (Notice).

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I. The Commission Generally Should Adopt the Same Rules for the F Block as It Used for the C Block

NextWave supports those commenters who recommend that the Commission adopt the same rules for the F block auction as it used for the C block auction.^{2/} Indeed, NextWave believes that, despite many setbacks, the Commission crafted a set of rules for and conducted the C block auction in a manner that has met the Congressional mandate of "disseminating licenses among a wide variety of applicants."^{3/} The Commission's C block auction rules are a careful balancing of the need to bring in new entrants against the difficulties of such entrants to raise the capital necessary to participate in the telecommunications industry.

NextWave asks the Commission to look at the likely results of that auction rather than rely on assertions that the C block auctions did not achieve intended objectives.^{4/} Unlike the A & B block auction, where there was twice as much spectrum and one-tenth the number of opening round bidders, the C block auction has shown diversity from the beginning with 254 qualified bidders. Whereas at the end of the A & B block auction, there were 18 winning bidders with an average of 26 million pops per bidder, at close to the end of the C block auction, there will likely be more than 90 new PCS entrants with an average of 2.8 million pops per bidder. Furthermore, the mix of players includes national and

^{2/} See, e.g., Comments of DCR Communications, Inc. at 4 and Comments of Sprint Corporation at 2.

^{3/} See *In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding (Competitive Bidding Proceeding)*, Fifth Report and Order, 9 FCC Rcd 5532 at ¶ 169 (1994) (*Fifth Report and Order*) and 47 U.S.C. §309(j)(3)(B).

^{4/} Some very large entities whose own success is based in large part on starting small, but with a "big" vision, would have you believe that the Commission's rules in providing opportunities for entrepreneurs and small businesses meant for such businesses to remain small. "It is not readily apparent how a business can be considered "small" when it is bidding four billion dollars for licenses today and expecting to pay billions more for build-out tomorrow." AT&T Wireless at 3-4.

regional players and smaller, local players. One-third of the current high bidders hold only one license.

In its *Competitive Bidding Fifth Report and Order* the Commission noted that its goal was to ensure that "at least ten winning bidders enjoy the benefits of the entrepreneurs blocks."^{5/} The C block auction will likely generate more than 90 winning bidders, several times the number the Commission would have considered successful for both the C and F block auctions. Clearly, despite commenters claims to the contrary, the C block auctions more than met Commission expectations.^{6/}

As compelling is the level of participation of women and minorities in the control groups or senior management of bidders who are likely to win ten or more markets. More than one-third of these top bidders claim minority or woman-owned status. And, if you examine their Forms 175 more closely, one-half of these top bidders include companies that either claim minority or woman-owned status, or have woman and minorities in senior, controlling positions. This is true for three of the top four bidders, including NextWave. Through its choice of Basic Trading Areas (BTAs) as the bidding unit and through carefully

^{5/} *Fifth Report and Order* at ¶ 170. Many commenters in fact suggest that in order to ensure greater participation in F block and avoid the so-called "failings" of the C block auctions the Commission should limit the amount each bidder can win to 10 % of the population or an absolute cap of around 25 million pops. For good public policy reasons the Commission explicitly chose not to limit acquisition of licenses in such a manner. We note that the Commission has previously addressed the issue of "single entity purchase limits" and limited the number of markets a single bidder could win in the C and F blocks to ten percent of the total markets or 98. The Commission was clear that it intended for individual bidders to acquire enough licenses to "create large and efficient regional services." *Fifth Report and Order*, ¶ 170. The Commission later affirmed this decision indicating it would allow "bidders to effectuate aggregation strategies that include large numbers of licenses and extensive geographic coverage." *Competitive Bidding Fifth Memorandum Opinion and Order* 10 FCC Rcd 403 (1995) at ¶114. In the *Fifth Memorandum Opinion and Order* the Commission specifically declined to adopt rules that would limit entities to 10 percent of the population or 25 million pops as preventing meaningful regional cluster strategies. *Id.* at ¶ 116.

^{6/} NextWave would argue that what many commenters note as a failure of the C block auctions might better be characterized as the failure of an applicant's business plan and the failure of incumbent cellular and PCS licensees to cripple meaningful new competitive entrants, not a failure of the Commission's rules.

crafted rules, the Commission was able to generate significant entrepreneurial activity and disseminate widely PCS licenses.

A. The Commission Should Consider Moderate Changes to Its Rules

While NextWave agrees with those commenters who believe the rules governing the C block auctions have struck the appropriate balance, one area of concern that NextWave and other C block participants have raised is the extent to which applicants are required to report debt. The Commission's rules currently require that for C block participants "ownership interests shall be calculated on a fully diluted basis; all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder already have been fully exercised."^{2/} NextWave believes that certain applicants have attempted to circumvent these rules by receiving full capitalization through debt from a single entity. While the question whether such disclosure is currently required may be

^{2/} 47 C.F.R. § 24.709 (b)(7). We note that in its comments Iowa LP inaccurately states that the Commission does not require convertible debt to be fully diluted and that NextWave is "a representative example where large entities are circumventing the attribution rules by using financing arrangements instead of equity." Comments of Iowa LP at 3. Furthermore, Mountain Solutions also inaccurately ties NextWave to its accusation that some bidders have "loans [that] include conditions that will allow the large corporation to turn the loans into equity after the brief FCC-mandated holding period has expired." Comments of Mountain Solutions at 2. Telephone Electronics Corporation (TEC) makes a very similar statement. Comments of TEC at 3. While NextWave believes that full discussion of these issues is more appropriate in the Commission's well-established licensing process, it wishes to correct for the record these commenters' inaccuracies. In fact, as noted above, the Commission does require full dilution of convertible debt, which NextWave duly reported. Even fully diluted, which may never occur, as of its most recent Form 175 filing, NextWave's control group holds 31% and no single investor holds more than 8% of the equity. Had these commenters looked to the Commission's rules and NextWave's Form 175 rather than to inaccurate press reports for its information, it would not have been so misinformed.

If, on the other hand, such comments are meant to support a requirement that applicants also report all debt, particularly debt from a single entity that provides the majority of an applicant's capital, NextWave would fully support such a clarification of the Commission's rules.

considered an area of ambiguity under the Commission's existing rules,^{8/} NextWave believes that the Commission should rightfully view such a structure as outside the spirit of the rules, and clarify its rules to explicitly require that applicants report such arrangements.

B. The Commission Should Auction D, E and F Together and Allow C Block Winners to Participate As Small Businesses

As indicated in its comments to this proceeding, NextWave believes that the Commission should auction the D, E and F blocks simultaneously and in the same auction. Several commenters support this, noting that the Commission has enough experience and appropriate software to manage such a process.^{9/} Furthermore, as NextWave indicated in its comments, several commenters note that conducting the F block auction together with the D and E block auctions will likely provide for even greater dissemination of licenses among a wide variety of applicants.^{10/}

Furthermore, NextWave agrees with those commenters who insist that C block licensees should not be excluded from participating in F block by virtue of their licenses alone. As NextWave noted in its comments, "[u]ntil the Commission released its *Notice*, it had given no indication that it might consider licenses acquired in the C block to be assets for purposes of entrepreneurs' block eligibility. Because the two spectrum blocks are highly interdependent, many bidders have made decisions regarding C block eligibility and markets

^{8/} The Commission's rules currently require that applicants provide a list of any person "holding five percent or more of each class of stock, warrants, options or *debt securities* together with the amount and percentage held, and the name, address, citizenship and principal place of business of any person on whose account, if other than the holder, such interest is held." 47 CFR 24.813(a)(3) (emphasis added). However, it is not clear whether all applicants interpret this rule in the same manner or have abided by it.

^{9/} See, e.g., Comments of Auction Strategy Inc. at 4, Comments of North Coast Mobile Communications, Inc. at 19, Comments of Omnipoint at 6, Comments of Personal Connect at 1, Comments of Phoenix, L.L.C. at 4, Comments of Spectrum Resources, Inc. at 1, and Comments of U.S. Intelco Wireless Communications, Inc. at 3.

^{10/} See, e.g., Comments of Auction Strategy Inc. at 4.

to purchase based on a reasonable expectation of participating in the F block."^{11/} DCR Communications, Inc. agrees and states "the 10 MHz licenses may have been part of C block applicant's business plans, informing their C block bidding."^{12/} Other commenters, several of whom are C block bidders that would not be excluded from participation in the F block auction by virtue of their winnings, or entities that did not participate in C block at all, agree and suggest that C block winning bids cannot reasonably be counted as assets for purposes of the F block auction.^{13/}

Had the Commission indicated an intention to exclude C block licensees from participation in the F block, NextWave and other bidders certainly would have pursued a different strategy in the current C block auction. Instead, all bidders limited C block upfront payments and bidding relying on the Commission's rules linking the C and F blocks.

II. The Commission Should Consider Raising the Upfront Payment for the F Block

Several commenters suggest that the Commission should in some manner tie upfront payments to the amounts bid at auction rather than to eligibility.^{14/} NextWave believes that

^{11/} Comments of NextWave at 5. NextWave notes that North Coast Mobile Communications characterizes allowing C block participants with winning bids in excess of \$500 million to participate in the F block auction as a "change" in the Commission's rules. See Comments of North Coast Mobile at 7. NextWave and other commenters argue that not allowing such C block bidders in the F block would in fact be a change to the Commission rules. See, e.g., Comments of DCR, Devon, Omnipoint and Virginia PCS alliance.

^{12/} Comments of DCR at 9.

^{13/} "There is no reason to penalize a designated entity by preventing it from acquiring a 10 MHz PCS license simply because it was successful in bidding on the 30 MHz C block licenses." Comments of Devon at 12. See also, Comments of Virginia PCS Alliance at 4-5, Comments of Sprint Corporation at 7, and Comments of Western Wireless Corp. at 28.

^{14/} For example, AT&T Wireless asks that bidders pay \$.10 per MHzpop upfront and supplement the upfront payment when it falls below 4% of total high bids. Comments of AT&T Wireless at 8. AirLink would require that bidders have a bid exposure no greater than ten times their upfront payment. Comments of AirLink L.L.C. at 9. GO Communications would require bidders to submit preauction payment of 20% of total bids and submit more as they bid more. Comments of GO Communications Corp. at 1. KMTel would require that total net dollars bid not exceed ten times the amount placed on deposit. Comments of KMTel L.L.C. at 3.

the Commission should not adopt such a proposal since it would require bidders to reveal strategic information about its license valuations and bidding strategy that the Commission's auction rules specifically seek to protect.

NextWave agrees however, that there is evidence in this auction that some C block participants were bidding well beyond the resources revealed by their Forms 175. NextWave agrees with the commenters who suggest that the price-per-pop upfront payment in the C block auction was out of proportion to the amounts bid, and that a higher price-per-pop upfront payment would, as the Commission states, discourage "insincere or frivolous" bidding.^{15/} NextWave agrees with the Commission and several commenters who suggest raising the upfront payment to \$.02 per MHzpop. This increase in an upfront payment in combination with requiring the greater financial disclosure that NextWave recommends above would provide a deterrent to insincere bidding.

III. The Commission Should Allow Cellular Providers to Acquire More than One 10 MHz License if It Allows PCS Providers an Equivalent Opportunity

Cellular operators argue that the current rules regarding Commercial Mobile Radio Service (CMRS) spectrum aggregation caps are "complicated" and that it would be easier if the Commission were to adopt one cap, that is, 45 MHz for all CMRS, as opposed to 35 MHz for cellular, 40 MHz for PCS and 45 MHz generally. Allowing all CMRS providers to aggregate spectrum to 45 MHz benefits only the cellular industry, not PCS or Specialized Mobile Radio Service (SMRS) licensees. NextWave would agree with dropping the separate caps on cellular and PCS licensees if the Commission would permit PCS licensees an

^{15/} Notice at ¶ 57.

equivalent opportunity to acquire 45 MHz of spectrum through what would likely be fairly complex disaggregation procedures.


IV. Conclusion

For the foregoing reasons, NextWave respectfully urges the Commission to adopt its C block auction rules, with the minor changes suggested *supra*, for the F block auction.

Respectfully submitted,

Charla M. Rath
Freedom Technologies, Inc.
1100 New York Avenue
Suite 650 East
Washington, DC 20005
202/371-2220

Consultants to NextWave
Telecom, Inc


Janice Obuchowski
Of Counsel,
Halprin, Temple, Goodman & Sugrue
1100 New York Avenue
Suite 650 East
Washington, DC 20005

Executive Vice President
NextWave Telecom, Inc.

April 25, 1996

CERTIFICATE OF SERVICE

I, Kay Hawkins, hereby certify that on the 25th day of April, 1996, a true copy of the foregoing Comments of NextWave Telecom Inc. was hand delivered to the following:

Chairman Reed E. Hundt
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, D.C. 20554

Commissioner Rachelle B. Chong
Federal Communications Commission
1919 M Street, N.W.
Room 844
Washington, D.C. 20554

Mr. Gerald P. Vaughan
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 5002
Washington, D.C. 20554

Kathleen O'Brien Ham
Chief, Auctions Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5322
Washington, D.C. 20554

Mr. Robert M. Pepper
Office of Plans and Policy
Federal Communications Commission
1919 M Street, N.W.
Room 822
Washington, D.C. 20554

Commissioner James H. Quello
Federal Communications Commission
1919 M Street, N.W.
Room 802
Washington, D.C. 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, D.C. 20554

Ms. Michele Farquhar
Chief, Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 5002
Washington, D.C. 20554

Ms. Sue McNeil
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 5114-A
Washington, D.C. 20554

Mr. Mark Bollinger
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 5322
Washington, D.C. 20554

And were mailed, postage prepaid to:

James F. Ireland, III
Cole, Raywid & Braverman, L.L.P.
Attorneys for North Coast Mobile
Communications, Inc.
Second Floor
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-3458

William R. Richardson, Jr.
Lynn R. Charytan
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037

Cathleen A. Massey
AT&T Wireless Services, Inc.
1150 Connecticut Avenue, N.W.
4th Floor
Washington, D.C. 20036

Shelley Spencer
AirLink, L.L.C.
3000 K Street, N.W., Suite 300
Washington, D.C. 20007

Curtis T. White
4201 Connecticut Ave., N.W.
Suite 402
Washington, D.C. 20008-1158

Glenn S. Rabin
ALLTEL Services Corporation
655 15th Street, N.W., Suite 220
Washington, D.C. 20005

Steven N. Teplitz
Fleischman and Walsh, L.L.P.
1400 Sixteenth Street, N.W.
Washington, D.C. 20036

David J. Kaufman
Lorretta K. Tobin
Brown Nietert & Kaufman, Chartered
1920 N Street, N.W., Suite 660
Washington, D.C. 20036

Peter Cramton, President
Auction Strategy Inc.
4405 Holly Hill Road
University Park, MD 20782

Carressa D. Bennet
Michael R. Bennet
Bennet & Bennet, PLLC
1831 Ontario Place, N.W.
Suite 200
Washington, D.C. 20009

John F. Beasley
William B. Barfield
Jim O. Llewellyn
1155 Peachtree Street, N.E.
Suite 1800
Atlanta, GA 30309-2641

Charles P. Featherstun
David G. Richards
1133 21st Street, N.W.
Washington, D.C. 20036

Ken W. Bray
Inventor
6389 Cohasset Road
Chico, CA 95926

Jay L. Birnbaum
David H. Pawlik
Marc S. Martin
Skadden, Arps, Slate, Meagher & Flom
1440 New York Avenue, N.W.
Washington, D.C. 20005

Michael F. Altschul
Randall S. Coleman
Andrea D. Williams
Cellular Telecommunicaitons Industry
Association
1250 Connecticut Avenue, N.W., Suite 200
Washington, D.C. 20036

Thomas E. Taylor
Douglas E. Hart
Frost & Jacobs
2500 PNC Center
201 East Fifth Street
Cincinnati, OH 45202

Deborah A. Disch
Cincinnati Bell Telephone
201 E. Fourth Street, 102-860
P. O. Box 2301
Cincinnati, OH 45201

David L. Nace
Luka, McGowan, Nace & Gutierrez,
Chartered
1111 19th Street, N.W., 12th Floor
Washington, D.C. 20036

Gerard G. Adams, President
Columbia Cellular, Inc.
1122 East Green Street
Pasadena, CA 91106

Lawrence J. Movshin
Wilkinson, Barker, Knauer & Quinn
1735 New York Avenue, N.W.
Suite 600
Washington, D.C. 20006-5289

William D. Chamblin III
President
Conestoga Wireless Company
661 Moore Road
King of Prussia, PA 19406

Joe D. Edge
Mark F. Dever
Drinker Biddle & Reath
901 - 15th Street, N.W., Suite 900
Washington, D.C. 20005

Leonard J. Kennedy
Richard S. Denning
Dow, Lohnes & Albertson
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036-6802

Andre J. Lachance
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036

Steven A. Zecola
GO Communications Corporation
201 N. Union Street, Suite 410
Alexandria, VA 22314-2642

Melodie A. Virtue
Haley Bader & Potts P.L.C.
4350 North Fairfax Drive, Suite 900
Arlington, VA 22203-1633

Harvey Leong
Telecommunications Consulting and
Investments
16 Hermit Lane
Westport, CT 06880

Steven R. Bradley
Integrated Communications Group
Corporation
1122 E. Green Street
Pasadena, CA 91106

Philip M. Bradley
Integrated VOICESYS
3806 Dunford Lane, Suite D
Inglewood, CA 90305-2261

James U. Troup
Arter & Hadden
1801 K Street, N.W., Suite 400K
Washington, D.C. 20006-1301

Michael H. Kappar
KMTel, L.L.C.

Jack E. Robinson
National Telecom PCS, Inc.
Clearwater House
2187 Atlantic Street
Stamford, CT 06902

David Cosson
L. Marie Guillory
National Telephone Cooperative Association
2626 Pennsylvania Avenue, N.W.
Washington, D.C. 20037

Laurie L. Arthur
4513 Pin Oak Court
Sioux Falls, SD 57103

James F. Ireland
Theresa A. Zeterberg
Cole, Raywid & Braverman, LLP
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20554

Mark J. Tauber
Mark J. O'Connor
Piper & Marbury L.L.P.
1200 19th Street, N.W.
Seventh Floor
Washington, D.C. 20036

Mark Golden
Robert R. Cohen
PCIA
500 Montgomery Street, Suite 700
Alexandria, VA 22314-1561

R. Michael Senkowski
Katherine M. Holden
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Tom A. Alberg
Personal Connect Communications
2300 Carlton Point
Kirkland, WA 98033

John Hearne
100 Wilshire Blvd., Suite 1000
Santa Monica, CA 90401

Lawrence R. Sidman
Verner, Liipfert, Bernhard, McPherson
and Hand, Chartered
901 - 15th Street, N.W., Suite 700
Washington, D.C. 20005

Ashton R. Hardy
Hardy and Carey, L.L.P.
111 Veterans Blvd. - Suite 255
Metairie, LA 70005

David McCarty
Rendall and Associates
5000 Falls of Neuse Road
Raleigh, NC 27609

George Petrutsas
Paul J. Feldman
Fletcher, Heald & Hildreth, P.L.C.
1300 North 17th Street
11th Floor
Rosslyn, VA 22209

Carlos V. Roberts
Spectrum Resources, Inc.
307 Annandale Road, Suite 101
Falls Church, VA 22042

Jay C. Keithley
Nancy R. McCabe
1850 M Street, N.W., Suite 1100
Washington, D.C. 20036

George Y. Wheeler
Koteen & Naftalin
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036

R. H. Moore
U.S. Intelco Wireless Communications, Inc.
P. O. Box 8
Olympia, WA 98507-008


Elridge A. Stafford
US West, Inc.
1020 19th Street, N.W., Suite 700
Washington, D.C. 20036

Charles H. Carrathers III
Hunton & Williams
951 East Byrd Street
Richmond, VA 23219

Charles H. Helein
Helein & Associates, P.C.
8180 Greensboro Drive, Suite 700
McLean, VA 22102

Paul C. Besozzi
Patton Boggs, L.L.P.
2550 M Street, N.W.
Washington, D.C. 20037

Louis Gurman
Doane F. Kiechel
Gurman, Blask & Freedman, Chartered
1400 16th Street, N.W., Suite 500
Washington, D.C. 20036


Kay Hawkins